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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-207.

AKRON PRESFORM MOLD COMPANY,
Petitioner,

vs.

McNEIL CORPORATION and Sun Corporation;
THE B. F. GOODRICH COMPANY and
Sun Corporation; and
THE B. F. GOODRICH COMPANY,
McNeil Corporation, and Sun Corporation,
Respondents.

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF
In Support Of
PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

SUPPLEMENT TO PETITION

The brief in opposition of respondent McNeil Corporation ("McNeil") concludes with a contention that this petition for review of the combined decision of the Court of Appeals for the Sixth Circuit below [496 F.2d 230 (1974)] is devoid of any ". . . substantively reviewable question, a conflict [restriction] of decisions [of this Court and other Federal Courts of Appeal] or a significance which exceeds the interests of parties to this action . . ." (McNeil Br. p. 16). The brief in opposition of respondent Sun Corporation ("Sun") paraphrases this conclusion

(Sun Br. p. 15) and the tenor of this contention is expressed at the outset of the brief in opposition of respondent The B. F. Goodrich Company ("Goodrich").

The independent editorial staff of a widely circulated weekly commentary in the field of patent law and anti-trust law relating thereto has deemed otherwise, especially with respect to the contention that the decision below affects only the interests of parties in this action.

As "—other intervening matter not available at the time of his [petitioner's] last filing" [Rule 24(5)], the Court's attention is called to the addendum of this brief reprinting an abstract of this petition on page A-13 of the Bureau of National Affairs' *Patent, Trademark & Copyright Journal* for the week of September 19, 1974.[1] As a matter of general interest in the fields of patent and related anti-trust law, three of the questions presented for review by petitioner ("Presform") are abstracted, namely (i) the exclusion from *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) of conspiracies to effect fraudulent maintenance of a patent dominating relevant markets, (ii) the exclusion from the sweep of *Zenith Radio Corp. v. Hazeltine Research Corp.*, 401 U.S. 321 (1971) of those cases where the very existence of a cause of action for anti-trust law violation, as distinguished from its consequent anti-trust law damages,

[1] The Court and respondents may rest assured that neither petitioner nor its attorney or other representative in any way called attention of this publisher or any personnel connected with it to the filing of, or intention to file, this petition or would pretend to have any direct or indirect influence upon the editorial judgment of its staff as to what it might or might not elect to publish as "News and Comments". Further, this *Journal* regularly reports as newsworthy the *granting* of petitions for certiorari relating to patents, trademarks, copyrights, trade-secrets, and anti-trust law cases affecting these fields. However, a search of recent indices of this commentary reveals no other publication of an abstract of such a petition merely *filed* for certiorari and awaiting action by the Court during this term.

is speculative, and (iii) the abuse of 35 U.S.C. 122 to withhold information that would establish an absence of contributory infringement under 35 U.S.C. 271(c).

REPLIES

The three respondents present divergent arguments in opposition to this petition, with those of McNeil largely overlapping those of Sun. Confining, as required by Rule 24(4), this reply to the opposing arguments which are in addition to mere dispute of the reasons advanced in support of this petition, Presform replies to respondents in alphabetic order, as follows:

1. GOODRICH.

One might infer from the opposing brief of Goodrich that, in lieu of and prior to any answer to Presform's complaints filed July 3, 1968, for an award of damages and injunctive relief against Goodrich arising from its alleged co-conspiracies to violate the anti-trust laws,[2] Goodrich's motions eventually filed on July 15, 1971 to dismiss under the statute of limitation [15 U.S.C. 15(b)] were supported by affidavits which disputed all the factual allegations of Presform's complaint as summarized in the decisions of the Courts below.[3] Any such inference would be incorrect.[4]

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[2] Northern District of Ohio, CA 68-488 *Presform v. Goodrich and Sun;* CA 68-489, *Presform v. Goodrich, McNeil, and Sun.*

[3] Petition appendix, A9-A10 (Court of Appeals); A18-A19 and A35-A36 (District Court). As the record will show, however, all these summaries of undisputed factual allegation in all of Presform's complaints omit any reference to Presform's prayers for injunctive relief against continuation of the alleged conspiracies; such overlooked prayers in each Presform complaint, in the light of the absence of any affirmative affidavit submitted on behalf of respondent that the alleged conspiracies had never been

(Footnote continued on following page)

From this inaccurately inferred premise, the thrust of Goodrich's argument in opposition to this petition (Goodrich Br. pp. 3-7) is that, although neither Court below specifically cited the rule, their results were correct under the 1963 amendment to Rule 56(e), Federal Rules of Civil Procedure added to overturn a line of Third Circuit decisions that "well pleaded" allegations were immune from attack by affidavit only. (See Advisory Committee notes on 1963 amendment to Rule 56(e), 28 U.S.C.A., Rule 56). These two sentences added in 1963 are:

> "When a motion for summary judgment is made and *supported as provided by this rule,* an adverse party may not rest upon mere allegations or denials of his

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(Continued from previous page)

entered into or had terminated more than four years before July 3, 1968, were, of course, inconsistent with any conclusion that the last overt acts of the conspiracies were more than four years old when Presform filed its complaints in 1968.

[4] As the record will show, Goodrich, in support of its motions to dismiss the District Court actions C68-488 and C68-489 as barred by 15 U.S.C. 15 (b), filed only in the latter an affidavit of Harry B. Warner, president of B. F. Goodrich Chemical Co. in 1961-2. This Warner affidavit merely fixes June 23, 1961, as the date of his meeting in Goodrich offices with representatives of Sun and Ideal Toy Corporation relative to Ideal's taking a license under Sun's Molitor patent. Warner's affidavit in no way denied either the earlier and still continuing Goodrich-Sun deal alleged in C68-488 or, as alleged in C68-489, that McNeil was also represented at that 1961 meeting in Goodrich's offices. Nor does the Warner affidavit deny that meeting, as alleged in C68-489, was the genesis of the Goodrich-McNeil-Sun conspiracy to terrorize the doll industry and suppliers to it of plastics and plastic processing machinery who were competitors of Goodrich (plastics) and McNeil (machinery) by broad-side threats to the entire industry to enforce Sun's Molitor process patent—as *commenced,* in Sun's name only, by letters of December 22, 1961 (Petition Appendix A36). Simple "Shepardizing" of this Molitor patent, No. 2,629,134, establishes that these were no idle threats to the industries affected; at least two publicized suits followed, *Sun v. Horsman Doll, Inc.,* U.S.D.C., E.D. So. Carolina, No. AC 902 (settled by consent decree in July, 1966) and *Sun v. Mattel, Inc.,* U.S.D.C. C.D. California, No. 63-1307FW, still pending at the time of filing Presform's complaints below on July 3, 1968.

> pleading, but his response, by affidavit *or as otherwise provided in this rule,* must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate,* shall be entered against him." (Emphasis supplied.)

In short, Goodrich contends that, having filed its inconclusive and basically non-contradictory Warner affidavit (See n. 4 above), the undisputed factual allegations of Presform's 1968 complaints were meaningless and, instead, it therefore became Presform's obligation to support by affidavit the allegations of its 1968 complaints against Goodrich which had not been pierced by Goodrich's Warner affidavit or otherwise put in issue by Goodrich in 1971.

This position of Goodrich that its 1971 motion was automatically entitled to be sustained because Presform did not file affidavits supporting the factual allegations of Presform's 1968 complaints not challenged by Goodrich necessarily requires the further erroneous assumption that somehow the 1963 addition to Rule 56(e), F.R.C.P. repealed the continuing provision of the preceding subsection of the same rule stating:

> "*(c) Motion and Proceedings Thereon.* The motion [for summary judgment] shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing *may* serve opposing affidavits. The judgment shall be rendered forthwith *if the pleadings,* depositions, answers to interrogatories, and admissions *on file, together with the affidavits, if any,* show there is no genuine issue as to *any material fact* and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of lia-

bility alone although there is a genuine issue as to the amount of damages."[5] (Emphasis supplied.)

Goodrich's position also requires that the 1963 amendment of Rule 56(e), F.R.C.P., was correctly followed by the Courts below as an effective repeal of the provisions of Rule 8, F.R.C.P., "General Rules of Pleading" applicable to the unanswered complaints below, namely:

> "*(d) Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to amount of damage, *are admitted when not denied* in the responsive pleading.****
>
> "*(f) Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice." (Emphasis supplied.)

In support of its reliance on the 1963 amendment of Rule 56(e), Goodrich (Br. p. 5-7) quotes at length from selected passages in MOORE'S FEDERAL PRACTICE (Second Ed.) and in *International Longshoremen's & Warehousemen's U. v. Kuntz,* 334 F.2d 165 (9th Cir., 1964).

That Goodrich's heavy reliance upon Rule 56(e) is untenable is clear from the Notes of the Advisory Committee on the 1963 amendment of Rule 56(e); (see 28 U.S.C.A., F.R.C.P. 52-58, p. 416):

> "The amendment [of Rule 56(e)] is not intended to derogate from the solemnity of the pleadings. ****

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[5] Goodrich (Br. p. 12) even chides Presform for not having supplied in 1971 an opposing affidavit proving the amount of its damages claimed in order to restore Presform to its former competitive position after it had, as alleged in C68-489, been eventually and finally forced to close its doors by the ultimate effects, as a *coup de grace,* of the Goodrich-McNeil-Sun conspiracy following the earlier Goodrich-Sun (C68-488) and McNeil-Sun (C68-487) conspiracies, all first brought to light, as far as Presform was concerned, by the 1967-68 decision of the New York District Court in *Barr v. Sun,* 277 F. Supp. 484 (1967); 156 U.S.P.Q. 392 (1968) and the record therein as it affected Presform. Neither Rule 56(c) nor (e) indicates any requirement for departure from the preferred practice of deferring proof of the amount of damage until after the right to them has been established; see *Sinclair Rfg. Co. v. Jenkins Co.* 289 U.S. 689, 694 (1933, Cardozo, J.)

> "Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example,***where the evidentiary matter in support of the motion does not establish *the absence of* a genuine issue, *summary judgment must be denied, even if no opposing evidentiary matter is presented.*" (Emphasis supplied.)

And rather than rely on the Ninth Circuit's 1964 decision in *Longshoremen's* and its selected passages from MOORE'S FEDERAL PRACTICE, Goodrich should have noted and been guided by that Circuit's succinct later statement of the burden of proof (conflicting squarely with the position of the Courts below) under Rule 56(e) as amended in 1963 in a case procedurally identical with the cases below, i.e., where the affidavits of the defendants in a motion for summary judgment failed to meet all the factual allegations of the complaint. See *Island Equipment Land Co. v. Guam Economic Dev. Authority,* 474 F.2d 753, 756 (9th Cir., 1973):

> "Since appellees failed to demonstrate the absence of any material issue of fact, appellants were not obliged to file counter-affidavits. 'Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.' Advisory Note of 1963 to Subdivision (e), Rule 56, quoted in 6 Moore's Federal Practice 2823; *see* Byrnes v. Mutual Life Insurance Co., 217 F.2d 497, 501 (9th Cir. 1954)."

The balance of the Goodrich brief amounts to no more than contentions:

(i) That—contrary to *Island Equipment*—the principle of *Poller v. Columbia Broadcasting System, Inc., et al.,* 368 U.S. 464, 468 and 473 (1962) that a court is required to take the view most favorable to the party opposing sum-

mary judgment, giving that party the benefit of all favorable inferences, is inapposite here because counter-affidavits, depositions, and exhibits were on file in *Poller;* the same principle announced in *McHenry v. Ford Motor Co.,* 269 F.2d 18, 22 (6th Cir., 1959) is inapposite here because *McHenry* was decided before the 1963 amendment of Rule 56(e), F.R.C.P., and the Third Circuit really only held in *Ransburg Electro-coating Corp. v. Lansdale Finishers, Inc.,* 484 F.2d 1037 (3d Cir., 1973) the record for a valid summary judgment must disclose no genuine issue of material fact, not that the absence of such issues warranting summary judgment as a matter of law must

> ". . . be proved affirmatively by the party invoking the conclusive force of the judgment." (3rd Cir. at 484 F.2d, 1038).

(ii) That, regardless of whether the insufficiency of the anti-trust claims of Barr Rubber Products would and, as alleged by Presform, did work direct damage under the anti-trust laws on Presform, as the facts theretofore concealed from Presform were uncovered to Presform in 1967-68 in the ineradicable record in *Barr v. Sun,* somehow the Second Circuit's reversal in *Barr v. Sun,* 425 F.2d 1114 (1970) of its District Court's finding of fraud and perjury on the part of Sun in the trial before it on matters *extra* the factual allegations in the complaints below, nonetheless ought to redound *in rem* to Goodrich's benefit, even though neither Goodrich nor Presform were parties to the *Barr v. Sun* litigation. From this premise which the District Court below could not accept (Petition App. A24-A25; A36-A37) and which refusal the Court of Appeals did not alter, Goodrich jumps to the equally untenable conclusion that the Courts below properly applied *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.,* 382 U.S. 172 (1965) and *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971).

2. McNEIL.

McNeil's brief in opposition commences with a "Statement" acknowledging that conspiracies alleged below stem from exploitation of Sun's Molitor patent, No. 2,629,134, which expired February 24, 1970. The statement continues, "Since 1970, however, the licensees [under that patent "At a time past . . . of some significance in the plastics molding industry"] no longer pay royalties, all litigation matters except this action have been disposed of and the former significance of the Molitor patent has diminished to a matter primarily of historical interest" (McNeil Br. p. 2). No such carefully phrased statement will be found in the affidavits submitted in July 1971 in support of the respondent's motion for summary dismissal of the actions below; it begs the questions of how many licensees are still paying royalties under yet unexpired patents which licensees were required to take with their Molitor process patent licenses (even patents originating with the licensees). Most certainly through the stays granted by the Courts below, over Presform's opposition, from July, 1968 to July, 1971 and the suspended litigation until the actions below were dismissed by the District Court below on April 26, 1973 (Petition, App. A18, A30, A35) competition by Presform or other prior plastic machinery manufacturers has not deprived McNeil of its dominance in the industry gained through the alleged unlawful conspiracies to exploit the Molitor patent. Nor does the record disclose when, if ever, there has been an expiration of the undenied self-perpetuating tying agreement alleged in CA 68-488 between Sun and Goodrich whereby, as a consideration for Goodrich's "technical confidence" in overlooking its prior development of the same process at its American Anode subsidiary (Petition Appendix A48-A50; A51), Sun agreed to buy 75% of its resin and plas-

ticizer requirements from Goodrich as a "side deal" to Goodrich's license under the Molitor patent. Until all residual non-competitive conditions arising from such exploitations are corrected and eliminated, the Molitor patent can hardly be relegated, as McNeil would have it, as merely "primarily historical".

In its "Statement" McNeil also relies on the Second Circuit decision in *Barr v. Sun*, although it was not strictly a party[6] and McNeil later appears to disclaim any interest or benefits arising from "collateral estoppel" (McNeil Br. p. 15).

Otherwise, McNeil's opposing brief (pp. 4-15) takes the form of an analysis of Presform's questions presented and McNeil's response to the reasons for granting Presform's petition. As such, it is basically a repetition and paraphrase of the appellate decision below, citing no new facts or additional decisions not basically controverted in Presform's petition or the foregoing reply to Goodrich and, thus, not appropriate for further reply with two exceptions, as follows:

McNeil's mistaken concept of fraudulent concealment of knowledge that Presform did not contributorily infringe under 35 U.S.C. 271(c).

1. *Question Raised Below.* McNeil's first challenge to Presform's contention that fraudulent enforcement against Presform of the injunction against contributory infringement obtained by concealing from the courts in the prior litigation, *National Latex Products Co., et al. v. Sun Rubber Co.*, 174 F.2d 224 (6th Cir., 1959) *reh. den.* 276 F.2d, 167 (1960) *cert. den.* 362 U.S. 989 (1960) con-

[6] At the appellate hearing leading to *Barr v. Sun*, 425 F.2d 1114 (2nd Cir., 1970) McNeil did appear as *"amicus curiae"*.

stituted a continuing overt act that was continuing to damage is that this question was never raised in either of the Courts below. McNeil is mistaken. The record will reveal that Presform appealed from the entire record in all three cases dismissed by the District Court below under Rule 10 (a), F.R.A.P., not by a partial transcript and statements of limited issues under Rule 10(b), F.R.A.P. In its original brief before the Court of Appeals below, commencing at p. 46, is a recital of "overt acts damaging to Presform as of date of complaint (in C 68-487, *Presform v. Sun and McNeil.*)" Presform pointed out the allegation that "to Sun's and McNeil's specific knowledge" which they withheld from the Courts during the prior *National Latex* litigation in 1957-60, there were substantial non-infringing uses for Presform machines that would vitiate the charge that Presform contributorily infringed the Molitor process patent, citing 35 U.S.C. 271(c) and *Aro v. Convertible Top Co.*, 365 U.S. 336 (1961).

2. McNeil's second challenge is that, anyhow, Presform also knew before the *Barr v. Sun* decision that there were substantial non-infringing uses for the Presform machines which would not contributorily infringe the Molitor process patent. In support of this challenge, McNeil reproduces as an addendum to its brief (p. 17-18) a letter from Presform's late attorney, A. H. Oldham, seeking a settlement to avoid extensive and expensive accounting proceedings, in which (Para. 5, p. 18) there is mention among other grounds that there are non-infringing uses for the "Miller" (Presform) machines. This letter is dated June 29, 1960, *after* Presform had exhausted all remedies in the United States District Court for the Northern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and certiorari had been denied in this Court (May 23, 1960, 362 U.S. 989).

This second challenge to the timeliness, under 15 U.S.C. 15(b), of Presform's anti-trust claim for a continuing overt act in fraudulently maintaining a patent is an error of fact and law. Whether Presform knew of such non-infringing uses for its machines before or after its "day in Court" and might, during that "day," have asserted them as a defense or even a permissive counterclaim is irrelevant. The factual fraud in maintenance of the Molitor process patent Presform was adjudicated to have contributorily infringed and thereby squeezed from the then major market for the machines lay in Sun's and McNeil's concealment of that knowledge and fact which would have vitiated the adjudication while ruthlessly pressing for an adjudication and the injunction that was still operative and in force when Presform filed its claim for damages in 1968 after Sun's and McNeil's own specific knowledge prior to 1960 came to light in the 1967-68 *Barr v. Sun* suit. The error in law of this challenge by McNeil was expressed by this Court in *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 671 (1944) as follows:

> Though Mercoid were barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13 (b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it. *Virginia-Carolina Chemical Co. v. Kirven*, 215 U.S. 252; *Larsen v. Northland Transportation Co.*, 292 U.S. 20. And see Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 26-28; Restatement of the Law of Judgments, § 58. The case is then governed by the principle that where the second cause

of action between the parties is upon a different claim the prior judgment is *res judicata* not as to issues which might have been tendered but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U.S. 351, 353. And see *Russell v. Place*, 94 U.S. 606.

3. SUN.

As indicated at the outset of this reply, Sun's brief in opposition is overlapped by McNeil's and otherwise met by the reply to Goodrich. Sun, as McNeil, also relies on Presform's late attorney's letter of June 29, 1960, as its major prop and is faulty for the same reasons in fact and in law under *Mercoid*.

CONCLUSION

It is respectfully submitted that rather than supporting the respondent's contentions that the combined decision below presents no conflict with decisions of this Court and other circuits, the opposing briefs, when analyzed, emphasize the validity of the questions presented by petitioner, the conflicts which should be resolved, and the need for issuing a writ of certiorari in this case.

Respectfully submitted,

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ADDENDUM

BNA's Patent, Trademark & Copyright Journal for September 19, 1974 (No. 195), p. A-13

NEWS & COMMENT

SUPREME COURT CALLED UPON TO REVIEW PATENT-ANTITRUST CASE

Claiming that it was falsely adjudicated a contributory infringer as a result of a patentee's fraudulent acts, a petitioner asks the Supreme Court to set aside a Sixth Circuit ruling that its antitrust actions are time-barred. (Akron Presform Mold Co. v. McNeil Corp., No. 74-207, 8/30/74)

The petitioner filed a number of antitrust suits in Ohio when the patent it had been enjoined from infringing was declared invalid (on fraud grounds) by the U.S. District Court of Southern New York. The Second Circuit however, subsequently overturned the district court's findings.

The U.S. District Court for Northern Ohio dismissed the petitioner's antitrust suits as time-barred and the Sixth Circuit affirmed. 496 F.2d 230, ——— USPQ ——— (CA6 1974). The court of appeals held that the alleged conspiracies complained of by the petitioner began more than four years prior to the time the complaints were filed, and that the delay in filing suit could not be excused: "Walker [Process, 382 U.S. 172, 147 USPQ 404 (1065)] says nothing about conspiracy claims, which are alleged in each of [petitioner's] three actions, and thus plainly does not excuse [petitioner's] delay in bringing its conspiracy charges." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), "tolls the statute of limitations where *damages* are speculative, not where the very existence of the *cause of action* is speculative."

The petitioner, however, argues that it did not sleep on its rights. Only after the Southern District of New York made its fraud and perjury findings was there full recognition of the wrong that had allegedly been done. Thus, notwithstanding the Second Circuit's reversal, the suits were timely. The petitioner also charges that 35 U.S.C. § 122 (providing for secrecy of patent applications) was an instrument of fraud in this case because it allowed the withholding of information that could have established noninfringement.